Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-140

ILLO APELBY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five.

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No. .....

ILLO APELBY,

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five.

Petitioner, ILLO APELBY, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Five, entered in the above-entitled case on February 27, 1978.

Opinions Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, initially was reported in 78 Cal.App.3d 73, but subsequently the Reporter of Decision was directed not to publish the said opinion in the official reports by order of the Supreme Court of the State of California, which order was made on April 27, 1978. A copy of the opinion of the Court of Appeal appears in Appendix A hereto, and the order of the California Supreme Court respecting non-publication appears in Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five (Appendix A), was entered on February 27, 1978. A due and timely petition for hearing by the California Supreme Court, after decision and opinion by the said Court of Appeal, was denied on April 27, 1978. A copy of the order denying the petition for hearing by the California Supreme Court and ordering non-publication of the Court of Appeal opinion appears in Appendix B hereto. Jurisdiction is invoked under 28 USC § 1257(3).

Question Presented.

Whether the seizure of all the motion picture films available for exhibition or sale in an adult bookstore was unreasonable, violating the free speech and press, due process and search and seizure provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution where the warrant issued solely upon the affidavit of a police officer who viewed and described to the magistrate only one film.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States appear in Appendix C hereto.

Statement.

On December 7, 1973, Search Warrant No. 10485 was executed on the premises of an adult bookstore and film arcade in Van Nuys, California.[1]

Among the property seized pursuant to Search Warrant No. 10485 was a motion picture film entitled "Swedish Erotica No. 4," one of the two films upon which Petitioner's conviction for the crime of pandering [California Penal Code § 266i] rests, as is explained hereafter. Additional evidence upon which Petitioner's convictions rest was seized pursuant to two additional search warrants, Nos. 10624 and 10622, but it is conceded that if the seizure of "Swedish Erotica No. 4" pursuant to Search Warrant No. 10485 was unlawful, the property seized pursuant to the latter two search warrants also must be suppressed as "fruit of the poisonous tree." There is no dispute that if Search Warrant No. 10485 was unlawfully issued on the basis of an insufficient affidavit, Petitioner's convictions herein must be reversed.

Search Warrant No. 10485 authorizes the search of premises described as "Camelot Adult Books-Movies" and authorizes the seizure of, *inter alia:*

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[1]The search warrants, affidavits in support thereof, and returns thereto, all were received in evidence by reference at Petitioner's pre-trial motion to suppress evidence as illegally seized, brought in the superior court pursuant to California Penal Code § 1538.5 [Clerk's Transcript (hereinafter "C.T."), 178, 180]. At Petitioner's request, the aforesaid exhibits, which are maintained in the state court records under the search warrant numbers, were transmitted to the Court of Appeal as originals [C.T. 301].

"[A] reel of 8mm film, color, no sound, titled 'Super Tits'. Three-ring binder, titled 'Films for Sale' on counter, next to film display. All films depicted in the binder, the films shown in the booths at the rear of the location. Those films on display on the counter and those films stored on the shelves behind the counter."

According to the Return to Search Warrant No. 10485, the film in question, "Swedish Erotica No. 4" (Item No. 15 on the Return), was seized from a "counter drawer" at the location.

The affidavit in support of the warrant alleges that the films whose seizure is requested are obscene. The police officer's affidavit contains the following facts relevant here:

"That on December 4, 1973 . . . your affiant observed the following: the interior of the location had a counter along the north end of the store. . . . Your affiant also noted the numbers 1 through 7 on the south wall. Under each number was a light. Behind the south wall your affiant observed booths, each numbered and all in black. The lights indicated that the booths were occupied or vacant. Under each of the lights on the south wall were color, still photographs. On the border of each photograph was the title and number of each film and on a separate card were instructions which told the customer that to view each film would cost a dollar. Your affiant observed that all of the still photos showed males and females nude. . . . In each, the focus of the camera was on the genitalia. . . . Your affiant noted that No. 4 photo depicted a male and female nude

and had the title 'Super Tits' and 'Pretty Girl Picture Presents'. . . . Your affiant noted that approximately 5 of the films were presented by Pretty Girl Pictures. Your affiant went to the counter and observed a male caucasian known to your affiant as Timothy Joseph Lynch. Your affiant asked Mr. Lynch 'Are these good films?' (Your affiant motioned to the pictorial display and film booths at the south wall.) Mr. Lynch stated 'Films that we sell are hard core. They all show penetration. You can buy any of them. The Pretty Girl Series are good films, they have good looking people in them. I have a special on these, (pointing to a display of film packages on the counter). They're 3 for $33 and they're all hard core.' Your affiant observed films on display on top of the counter. Each had a still photo on the outside of the package depicting oral copulation, sexual intercourse, sodomy or mutual masturbation. Your affiant noted numerous stacks of films, stored on shelves behind the counter. They also had still photos depicting oral copulation, sexual intercourse, sodomy or mutual masturbation. During the conversation, Mr. Lynch stated to your affiant that the films on the counter and on the shelves were all hard core pornography. Your affiant observed a 3-ring binder on the counter with the words 'Films for Sale' on the cover. Mr. Lynch took the binder and opened it. As Mr. Lynch leafed through the notebook your affiant observed numerous photos depicting males orally copulating females and females orally copulating males, sexual intercourse. The pictures were of both actual and simulated acts. Mr. Lynch

stated 'These are good hard-core films, especially the Pretty Girl Series.' Your affiant asked if the film showing in the No. 4 booth titled 'Super Tits' was a good film, and after Mr. Lynch said it was, your affiant stated that he would like to see the film."

The remainder of the affidavit describes the affiant's viewing of the film "Super Tits" and a description of its sexually explicit content. No film other than "Super Tits" is described in the affidavit. Finally, the affidavit contains the opinion of the affiant that *all* of the films displayed or offered for sale in the store are obscene.

As noted earlier, the film in question, "Swedish Erotica No. 4" was seized from a counter drawer. There is nothing in the affidavit concerning any films in a counter drawer.

At the hearing on Petitioner's motion to suppress evidence, held in the superior court prior to trial [C.T. 177], the prosecution produced the 3-ring binder entitled "Films for Sale" described in the affidavit and seized pursuant to the search warrant [C.T. 212]. The trial court apparently determined that one of the photographs contained in the binder purported to depict a frame of the film "Swedish Erotica No. 4" [C.T. 214]. However, the affidavit does not describe any of the photographs contained in the binder with particularity. Necessarily, then, the photograph purporting to relate to "Swedish Erotica No. 4" is not described.

How Federal Questions Are Presented.

Subsequent to the searches and seizures described above, complaints were filed against Petitioner APELBY and a co-Defendant, Erickson, charging them with violations of the pandering and oral copulation statutes (California Penal Code §§ 266i and 288a) based upon the production of the seized films "Swedish Erotica No. 4" and "Blue Movie No. 4".[2] The preliminary examinations were held on June 13, 1974 [C.T. 1-16; 51-113; 156-176]. A female performer in the film "Blue Movie No. 4" identified co-Defendant Erickson as a fellow performer in the film with whom she engaged in an act of oral copulation [C.T. 167]. Another woman testified that she appeared in both films engaging in sexual activities, and that she was paid to do so by Petitioner APELBY [C.T. 87-93; 165].

Following the preliminary examinations, Informations Nos. A-306752, A-305509 and A-305651 were filed, charging Petitioner APELBY with violations of the pandering and oral copulation statutes and charging co-Defendant Erickson with a single violation of the oral copulation statute [C.T. 17; 114-115; 218-219].

Prior to trial, Petitioner and his co-Defendant moved to suppress as evidence the property seized pursuant to Search Warrants Nos. 10485, 10624 and 10622, which includes the films "Swedish Erotica No. 4" and "Blue Movie No. 4", pursuant to California Penal Code § 1538.5. The motion was made on the grounds, *inter alia*, that (1) the affidavit in support of Search Warrant No. 10485 fails to set forth probable cause

[2]"Blue Movie No. 4" was seized pursuant to one of the subsequent search warrants.

for the seizure of the film "Swedish Erotica No. 4" [C.T. 125-131].

A pre-trial hearing on Petitioner's suppression motion pursuant to California Penal Code § 1538.5 was held in the superior court on December 21, 1974 [C.T. 177-217]. At the conclusion of the hearing, the court denied Petitioner's motion to suppress in all respects [C.T. 214-215; 27; 132; 271].

Following the denial of their motion to suppress evidence, Petitioner (and co-Defendant Erickson) elected to proceed to trial based upon a submission on the transcripts of the preliminary examinations [C.T. 33; 138; 278; R.T.* 2-8]. At the trial, the films "Swedish Erotica No. 4" and "Blue Movie No. 4", previously received in evidence at the preliminary examinations, were exhibited to the court [R.T. 20, 23].

Petitioner APELBY was found guilty on one count of violating California Penal Code § 288a as charged in Information No. A-306752 [C.T 41], one count of violating California Penal Code § 266i as charged in Information No. A-305509 [C.T. 146], and one count of violating California Penal Code § 266i as charged in Information No. A-305651 [C.T. 290]. Co-Defendant Erickson was found guilty of one count of violating California Penal Code § 288a as charged in Information No. A-305651 [C.T. 291].

Both APELBY and Erickson were granted probation and Petitioner APELBY, as a condition of probation, was ordered to spend 90 days in the county jail. Additionally, Petitioner APELBY and co-Defendant Erickson were ordered to pay fines as conditions of probation [C.T. 44, 149, 296, 297]. Petitioner

*"R.T." refers to the Reporter's Transcript on appeal.

APELBY remains at liberty on bail pending appeal [C.T. 45, 150, 298].

The opinion of the Court of Appeal was filed on February 27, 1978, reversing the convictions for oral copulation, but affirming Petitioner APELBY's pandering convictions, as aforesaid.

The said opinion of the Court of Appeal holds that a search warrant may issue to seize *all* of the motion picture films available for exhibition or sale in an adult bookstore upon the affidavit of a police officer who viewed and described only one film, who related the bookstore clerk's statements that "all of the films we sell are hard core", and who observed in the store still photographs depicting actual or simulated sexual acts presumably representing one frame of a film available for purchase. On the basis of the police officer's affidavit containing the foregoing facts, and no more, the Court of Appeal held there was probable cause "to believe that the [adult bookstore's film] collection *as a whole* was obscene" [Appendix A, p. 8 (emphasis added)], even though the officer actually viewed only one film—the only film described in the affidavit upon which Search Warrant No. 10485 issued. Petitioner's convictions rest upon the unseen, undescribed film.

Petitioner filed a due and timely petition for hearing by the California Supreme Court. The petition urged that the pandering convictions were secured by the use of evidence seized in violation of Petitioner's rights guaranteed by the First, Fourth and Fourteenth Amendments to the United States Constitution. As aforesaid, the petition for hearing was denied without written opinion by the California Supreme Court on April 27, 1978 [Appendix B].

REASONS FOR GRANTING THE WRIT.

Because the search warrant herein was issued to seize motion picture films on the basis of their alleged obscenity, the reasonableness of the search and seizure must be measured by standards consistent with the First Amendment's guarantee of freedom of expression. This Court has held that the setting of the bookstore or the commercial theatre each are presumptively under the protection of the First Amendment and, accordingly, a seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. *Roaden v. Kentucky*, 413 U.S. 496, 501, 504. Thus, "[t]he seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' . . . are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards." *Roaden v. Kentucky*, 413 U.S. at 502.

In testing the sufficiency of an affidavit in support of a search warrant to seize allegedly obscene materials, the crucial issue is whether the affidavit contains a description of the materials sufficient to permit a magistrate to "focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Property*, 367 U.S. 717, 732. Applying this standard, this Court invalidated a search warrant for the seizure of films which issued on the basis of a police officer's affidavit stating only the titles of the films and that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene. The Court held that a search warrant for the seizure of the films alleged to be obscene

may not issue on the mere conclusory allegations of a police officer. *Lee Art Theatre v. Virginia*, 392 U.S. 636.

The search warrant herein authorized seizure of the total film inventory of an adult bookstore based upon a police officer's affidavit describing but a single "illustrative" film, the only film actually viewed by the officer, together with a store clerk's characterization of his inventory as "hard core." Obviously, no facts were presented to the magistrate to permit him to "focus searchingly on the question of obscenity" with respect to the quantity of films never viewed by the police officer and thus never described to the magistrate. With respect to all of the unseen film, therefore, the police officer's opinion that the entire inventory of films is obscene is entirely conclusory and cannot support a determination of probable cause to believe the entire inventory obscene.

To permit the seizure of all motion picture films offered for sale or exhibition in an adult bookstore upon the affidavit of a police officer who has viewed and described only one film, poses substantial dangers to both First and Fourth Amendment interests. *Cf., Heller v. New York*, 413 U.S. 483.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

The People of the State of California, Plaintiff and Respondent, v. Illo Apelby and Keith Erickson, Defendants and Appellants. 2d Crim. No. 29834 (LASC Nos. A306752, A305509 & A305651).

Filed: Feb. 27, 1978.

APPEALS from judgments of the Superior Court of Los Angeles County. Frank Baffa, Judge. Affirmed in part and reversed in part.

Fleishman, Brown, Weston & Rhode and David M. Brown for Defendants and Appellants.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Criminal Division, S. Clark Moore, Assistant Attorney General, James H. Kline and William R. Pounders, Deputy Attorneys General, for Plaintiff and Respondent.

In nonjury trials submitted on the preliminary hearing transcripts in three different proceedings, appellant Apelby was found guilty on two counts of pandering (Pen. Code, § 266i) and one count of oral copulation (Pen. Code, § 288a). Appellant Erickson was found guilty on one count of oral copulation.

In No. A306752, Apelby's conviction of oral copulation was based on an aiding and abetting theory in that Apelby was the film maker and director of a movie entitled "Blue Eleven" in which an actress, Helen Madigan, orally copulated an actor, Jamey Gurman.

In No. A305509, Apelby's conviction of pandering was based upon Apelby's solicitation of an actress, Linnea Lambrecht, to perform sex acts for pay in another film made and directed by Apelby entitled "Swedish Erotica Number Four-Western Lust."

In No. A305651, Apelby's conviction of pandering was based upon his solicitation and payment of Miss Lambrecht for performing sex acts in another film entitled "Blue Number Four-Joint Connection." The basis of appellant Erickson's conviction of oral copulation was his participation in that film as the actor who was orally copulated.

The convictions of oral copulation must be reversed on the authority of *People v. Rossi*, 18 Cal.3d 295, 304. Prior to January 1, 1976, Penal Code section 288a broadly proscribed all oral copulation. Effective January 1, 1976, the Legislature amended the statute to proscribe oral copulation only when it is effected by force, committed while in a prison, or committed with a minor. Thus the acts of oral copulation for which appellants were convicted no longer constitute a crime. Under *Rossi* appellants' conduct may not be punished, since their judgments were not final prior to the effective date of the amendment.[1] There is no merit to the Attorney General's suggestion that this rule is inapplicable to appellants merely because numerous continuances were granted in the course of the proceedings.

[1]In fairness to the trial court it should be pointed out that *Rossi* had not been decided when the court sentenced appellants.

The only remaining issues concern appellant's[2] contention that the trial court erred in denying his motion to suppress evidence, including the three films which were obtained pursuant to three search warrants.

The first search warrant, No. 10485, authorized the search of an adult book and movie store on Victory Boulevard in Van Nuys. This warrant was based upon the affidavit of Officer Kinard concerning his observations at the store and conversations with the store clerk on December 4, 1973. Among the items seized pursuant to this warrant was "Swedish Erotica Number Four," the film involved in No. A305509. This film was then shown on January 4, 1974, to Miss Lambrecht, who identified herself as one of the participants. On the basis of information from Miss Lambrecht, the police obtained the address of the studio where "Swedish Erotica Number Four" was filmed, 154 North La Brea, and the address of appellant's business, 7225 Melrose Avenue. On this basis, search warrant No. 10624 was issued, authorizing the search of both of those locations for photographs, negatives, records, and props relating to "Swedish Erotica Number Four."

While executing warrant No. 10624 at 7225 Melrose, officers observed, in addition to records authorized by the warrant, advertising brochures relating to other sexually explicit films. On the basis of the information in the advertising brochures, officers obtained a supplemental search warrant, No. 10622, authorizing the

[2]Since the only count on which appellant Erickson was convicted is herein reversed in light of *Rossi*, the remaining discussion affects only appellant Apelby.

search of the premises for all the films named in the brochures, and records pertaining thereto. Pursuant to this latter warrant, officers seized the advertising brochures and numerous films, including "Blue Number Eleven" involved in No. A306752 and "Blue Number Four" involved in No. A305651.

Appellant contends (1) that the affidavit in support of search warrant No. 10485 was insufficient to establish probable cause for seizure of "Swedish Erotica Number Four"; (2) that the invalidity of warrant No. 10485 tainted the evidence seized pursuant to warrants Nos. 10624 and 10622; and (3) that warrant No. 10622 was the product of an unlawful search of the advertising brochures which was beyond the scope of warrant No. 10624. None of these contentions has merit.

SEARCH WARRANT NO. 10485

In his affidavit in support of search warrant No. 10485, Officer Kinard stated that on December 4, 1973, he entered the Camelot Adult Book Store on Victory Boulevard in Van Nuys and looked through two magazines, "Climax" and "Foreplay," and observed that each depicted oral copulation and sexual intercourse. He also observed seven movie booths. Each booth had a photograph on the outside bearing the title of the movie which could be viewed in the booth for a dollar. The officer asked the store clerk whether the films were good and the clerk replied, "Films that we sell are hard core. They all show penetration . . . . I have a special on these (pointing to a display of film packages on the counter). They're three for thirty-three dollars and they're all hard core." The officer observed the films on display on the counter.

Each had a still photo on the outside of the package depicting oral copulation, sexual intercourse, sodomy, or mutual masturbation. He also noticed numerous stacks of films on shelves behind the counter, also with still photos depicting the same subjects. The clerk again stated that the films on the counter and on the shelves were all hard-core pornography. There was a three-ring binder on the counter with the words "Films for Sale" on the cover. The clerk opened the binder and leafed through it, and the officer observed numerous still photos depicting oral copulation and sexual intercourse, both actual and simulated. The clerk stated, "These are good hard-core films, especially the pretty girl series." The officer then went to film booth No. 4 and observed one film, "Super Tits." A description of the oral copulation and sexual intercourse taking place in this film was attached to the affidavit. In the affiant's opinion, the film he viewed, the two magazines he perused, and the numerous other films on display and for sale at the location were obscene.

On the basis of the affidavit, the search warrant was issued authorizing seizure of "A Reel of 8 mm Film, color, no sound, titled 'Super Tits'. A Three-ring binder, titled 'Films For Sale' on counter, next to the film package display. All films depicted in the binder, the films shown in the booths at the rear of the location. Those films on display on the counter and those films stored on the shelves behind the counter. The magazines 'Climax' and 'Foreplay'. [A]ny invoices or shipping orders showing person(s) distributing, displaying, selling or exhibiting such matter."

Pursuant to this warrant, police officers seized numerous films from behind the counter and from counter drawers, including "Swedish Erotica Number Four."

Appellant argues that the affidavit did not provide probable cause to believe that any of the films not actually seen by the affiant was obscene. "Swedish Erotica Number Four" was not the film observed by the officer in the booth. The trial court found that it was one of the films included in the three-ring binder. The affidavit stated that the three-ring binder contained numerous photos depicting oral copulation and sexual intercourse, both actual and simulated. The photos in the binder presumably reflected scenes from the films listed therein. The store clerk stated, referring to the films in the binder, "These are good hard-core films." The clerk also stated, "Films that we sell are hard core. . . . [T]hey're all hard core."

We hold that the affidavit in No. 10485 was sufficient to enable the magistrate to focus searchingly on the question of the obscenity of the films behind the counter[3] and to consciously entertain an honest, strong suspicion that they were obscene. (*People v. Golden,* 20 Cal.App.3d 211, 217).

Appellant relies upon *People v. Superior Court* (*Freeman*), 14 Cal.3d 82. In that case the officer posed as a buyer of obscene films. The defendant Freeman showed the officer an album of still photographs containing scenes from available films and stated that they were hard core action films. Codefendant Horne appeared with a cart containing boxes of film, and one film was shown to the officer. Horne took the remaining films to the trunk of his car. Both the film viewed by the officer and the unseen films in

[3]*Marcus v. Search Warrant,* 367 U.S. 717, 732; *Lee Art Theatre v. Virginia,* 392 U.S. 636, 637; *Roaden v. Kentucky,* 413 U.S. 496, 506.

the car trunk were seized *without a warrant.* It was held that the seizures without a warrant were unlawful.

In the course of discussing whether there would have been probable cause for issuance of a warrant as to the unseen films in the car, the court made the following statements relied upon by appellant: "The canisters of film seized from the car were never seen by any of the officers, and aside from Freeman's representations they had no inkling as to their contents. Serious doubts may be entertained as to whether this evidence would even be sufficient to support the issuance of a warrant." (*Id.,* at p. 89.) "As to the *unseen* film, . . . it is apparent there was no probable cause to believe this particular film was not protected First Amendment material. Freeman's characterization of his inventory plus the 'illustrative' film viewed by Deputy Young could no more lead to the conclusion that all the remainder of the film was obscene than could a random sampling of a single book of a bookseller characterizing his inventory as sexually explicit lead to the conclusion that all the unseen books in his store were obscene." (*Id.* at p. 90 fn. 9; emphasis in original.)

The instant case is indistinguishable from *Freeman.* In this case the affidavit provided more than simply the store clerk's representations as to the nature of the films listed in the three-ring binder and stored at the counter. (*People v. Golden, supra.*)[4] Unlike

[4]In *Golden,* the defendant's statement as to the nature of the films was one factor which together with other information provided in an affidavit supplied probable cause to believe the materials were obscene. *Golden* is still good law in light of *Freeman.* In *Freeman,* the court merely rejected the People's

(This footnote is continued on next page)

Freeman, here the affiant actually observed the still photos on the outsides of numerous packages of films displayed at the counter and stacked behind the counter, and he stated that these photos depicted sexual intercourse, oral copulation, sodomy, and masturbation. The affiant also observed the photographs in the three-ring binder as the clerk leafed through it, and these photos, presumably depicting scenes from the listed films, also depicted oral copulation and sexual intercourse, both actual and simulated. "Swedish Erotica Number Four" was one of the films listed in the binder. The totality of the officer's observations, together with the clerk's representations as to the contents of the films, were sufficient to provide probable cause to believe they were obscene. (See *People v. Haskin*, 55 Cal.App.3d 231, 236.)

Appellant argues that the affidavit does not specifically contain any reference to "Swedish Erotica Number Four" or a description of the specific still photograph associated with that title in the three-ring binder.[5] We do not believe this requires suppression of "Swedish Erotica Number Four," where there was probable cause, based on the totality of the officer's observations and the clerk's statements, to believe that the collection as a whole was obscene. We hold "Swedish Erotica Number Four" was properly seized pursuant to warrant 10485 issued upon probable cause.

"novel proposition" that such statements *dispensed* with the warrant requirement. This does not mean such statements are of no value in an affidavit for a search warrant. The *Freeman* court distinguished *Golden* as a search warrant case and did not disapprove it. (*Id.*, 14 Cal.3d at p. 87.)

[5]On the motion to suppress, the superior court viewed the three-ring binder and the photograph from "Swedish Erotica Number Four."

SEARCH WARRANT NO. 10622

On the basis of information from Miss Lambrecht after showing her "Swedish Erotica Number Four," officers obtained search warrant 10624 to search two locations, the studio where the film was shot and appellant's office, for photographs, negatives, logs, diary, props, and business records specifically relating to the filming of "Swedish Erotica Number Four." Upon executing the warrant, the officers discovered that the office at 7225 Melrose was a 10-room office used for the packaging and distribution of films. They came upon one room where thousands of reels were stacked up and employees were at work at a table packaging the films into boxes and inserting advertising brochures in each package. The brochures were lying on tables in plain view. These brochures contained photographs of various sex acts with a film title and number and a short description of the films underneath. Officer Petroski was familiar with these brochures. Believing that the brochures did not fall within the scope of warrant 10624, Officer Petroski prepared an affidavit for a supplemental warrant, which became warrant No. 10622. He prepared that affidavit by reading three different series of brochures on the table and listing all of the films contained therein, together with a brief description (based on the descriptions contained in the brochures) of each film, in the affidavit. On this affidavit the officer obtained warrant No. 10622 which authorized the seizure of the brochures and all of the films listed in the brochures, plus records relating to these films. The two other films involved in this case, "Blue Number Eleven" and "Blue Number Four," were seized pursuant to warrant 10622.

It is appellant's contention that the officer acted unlawfully in reading and copying from the advertising brochures lying on the table as the basis for his affidavit for warrant No. 10622. He argues that the officer had no right to look at these brochures because they were not within the scope of warrant No. 10624 which related specifically to "Swedish Erotica Number Four."[6] This argument is without merit.

Appellant misplaces reliance on *Fixler v. Superior Court*, 38 Cal.App.3d 475, 481. In that case officers were executing a warrant authorizing the seizure of two specific sex magazines. At the warehouse, they found, in addition to the two named magazines, 171 other magazines which they *seized without a warrant*. The 171 unnamed magazines were suppressed because of the lack of a valid warrant.[7]

Here, on the other hand, the officer acted commendably and entirely properly to avoid any *Fixler* error. He did not seize the brochures, he merely perused them while they lay on the table, and then he applied for a warrant to seize the films described in the brochures and the brochures themselves. The fact that the officer could not seize the brochures and the films without a warrant does not mean that he could not relate his observations as the basis for securing a warrant.

The judgment in No. A306752 is reversed. The judgment against appellant Erickson in No. A305651

[6]Actually, a strong argument could be made that a seizure of at least one of the brochures was within the scope of warrant No. 10624. One of those brochures depicted the whole "Swedish Erotica" series, including "Swedish Erotica Number Four."

[7]Some attempt was made in *Fixler* to obtain a magistrate's approval of the seizure, but the attempt was invalid.

is reversed. In all other respects the judgments are affirmed.

CERTIFIED FOR PUBLICATION.

Ashby, *J.*

We concur:

Stephens, *Acting P. J.*

Hastings, *J.*

APPENDIX B.

Order Denying Hearing After Judgment by the Court of Appeal, 2d District, Division 5, Crim. No. 29834.

Order Due April 28, 1978.

In the Supreme Court of the State of California, in Bank.

People v. Apelby et al.

Filed: April 27, 1978.

Petition of Illo Apelby (appellant) petition for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above-entitled cause filed February 27, 1978 and appears in 78 Cal. App. 3d 73. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

Bird, C.J., Clark, J., and Richardson, J., are of the view that the opinion should remain published.

BIRD
Chief Justice

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978
NO. 78-140

ILLO APELBY,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the seizure of one motion picture film available for exhibition or sale in an adult bookstore was unreasonable, violating the free speech and press, due process and search and seizure provisions of the United States Con-

stitution, where the affidavit in support of the search warrant related a peace officer's viewing of another film in detail and his description of a binder entitled "Films for Sale" which offered the seized film for sale and had photographs of sexual acts, these films being pandered by the salesman's statement that they were all good hard-core films.

STATEMENT OF THE CASE

In nonjury trials submitted on the transcripts of the preliminary hearings in three different proceedings, petitioner was found guilty of two counts of pandering in violation of California Penal Code section 266i and one count of oral copulation in violation of Penal Code section 288a. His codefendant was found guilty of one count of oral copulation.

On appeal to the Court of Appeal of the State of California, Second Appellate District, Division Five, the convictions for oral copulation were reversed on the basis that a subsequent legislative amendment had eliminated from the proscription against oral copulation the acts which were the basis of the convictions. Petitioner's pandering convictions were affirmed, the court finding that the three search warrants were validly issued.

The first search warrant, which resulted in seizure of the film now challenged by petitioner, was based upon the affidavit of Los Angeles Police Officer John K. Kinard describing his observations at the Camelot Book Store at 14430 Victory Boulevard in Van Nuys on December 4, 1973. The affidavit states that Officer Kinard knew the operator, Timothy Lynch, and that Mr. Lynch said, "Films that we sell are hard core. They all show penetration . . ." Officer Kinard noted numerous stacks of films on the counter and on shelves behind the counter which had

still photographs on the outside of the packages depicting oral copulation, sexual intercourse, sodomy, or mutual masturbation. Mr. Lynch stated that they were all hard core pornography. He opened and leafed through a binder on the counter entitled "Films for Sale," and Officer Kinard observed numberous photos depicting males orally copulating females, females orally copulating males, and sexual intercourse. Mr. Lynch stated, "These are good hard-core films, especially the pretty girl series." Officer Kinard subsequently paid $1 for a private viewing of the film "Super Tits," taking notes of the action depicted on the screen. His verbal description of that film covers over 40 typewritten lines of his affidavit.

The search warrant authorized seizure of various films including all of the films in the binder titled "Films for Sale." The film "Swedish Erotica Number Four," which was depicted in the binder, was seized from a counter drawer.

ARGUMENT

THE AFFIDAVIT CONTAINED A SUFFICIENT DESCRIPTION OF THE MATERIALS TO BE SEIZED TO PERMIT THE MAGISTRATE TO FOCUS ON THE QUESTION OF OBSCENITY

Petitioner contends that the affidavit in support of the search warrant presented no facts to the magistrate to permit him to "focus searchingly on the question of obscenity" as he contends is required by *Marcus* v. *Search Warrant* (1961) 367 U.S. 717, 732. (Pet. pp. 10-11.) Petitioner thus appears to argue that only the actual viewing of all the films by the peace officer and his detailed description in the affidavit will permit the magistrate to determine probable obscenity. Such a proposition, of course, is meant to create such an impossible burden for

law enforcement that seizure of large quantities of pornographic films from adult book stores would be obviated.

Petitioner not only misreads the dictates of the *Marcus* decision but also misapplies that decision to selected facts in this case. The procedure condemned in *Marcus* for its failure to give due regard to the possible consequences for constitutionally protected speech involved warrants issued on the strength of conclusory assertions of a single police officer without any scrutiny by the judge of any materials considered by the officer to be obscene. (*Marcus* v. *Search Warrant, supra,* 367 U.S. at pp. 731-732.) Rather than requiring that a magistrate "focus searchingly on the question of obscenity" as petitioner suggests, the *Marcus* decision merely concludes that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without safeguards, such as a guide for the exercise of informed discretion and an opportunity for reflection and deliberation. (*Marcus* v. *Search Warrant, supra,* 367 U.S. at pp. 732-733.)

As applied to the facts of this case, the *Marcus* standards were met. It was the magistrate who determined whether the films were obscene, and no discretion was given to the officers, who were directed to seize all of the films depicted in the binder "Films for Sale." The magistrate determined that these films were obscene from (1) the detailed description of the film "Super Tits," which description took 40 typewritten lines, (2) the officer's description of the sex acts depicted in the photos in the binder, and (3) the operator's pandering of the films as hard-core pornography. As to the last point, both state and federal decisions leave no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. (*Splawn* v. *California* (1977) 431 U.S. 595, 598; *People* v. *Burnstad* (1973) 32 Cal.App.3d 560, 565; *People* v. *Golden* (1971) 20 Cal.App.3d 211, 217.)

Petitioner's First and Fourth Amendment rights were not violated by these procedures which had the safeguards which due process demands to assure that non-obscene material is given the constitutional protection to which it is entitled.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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